IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 591 of 1998

with

CRIMINAL APPEAL No 686 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMILABEN HASMUKHBHAI KHRISTI W/O HASMUKHBHAI ASHABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 591 of 1998

MR JM BUDDHBHATTI with M.R. Barot, Sr. Counsel for Appellant No.1

MR J.S YADAV for appellant No.2

MR KP RAVAL, APP for Respondent No. 1

2. Criminal AppealNo 686 of 1998

MRS KRISHNA V BAROT with M.R. Barot, Sr. Counsel
for Appellants
MR KP RAVAL, APP for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 21/09/2000

CAV COMMON JUDGEMENT : [Per: Vora, J.]

1. The Shakespearan love decended on earth, but with unfortunate, morbid and sad sequel, which gave birth to heinous felony causing thereby extinction of human life of auspicious boy, aged about 24 years, by unthinkable inhuman and lurid manner.

2. We must not though forget the cardinal principle of criminal justice that, however, the grave crime may be, but the prosecution must prove it beyond reasonable doubt. We are called upon to examine whether the death caused was homicidal, suicidal or accidental, and whether the present appellants could be held responsible for the same.

3. Both these Appeals are filed against the judgment and order of conviction, convicting all the appellants of both the Appeals under Section 302 read with Section 120-B of the Indian Penal Code, and punishing each of the appellants for the imprisonment of life and with fine.

4. The root of the prosecution story rests in deep love for each other, amongst two young human beings. Deceased in the present incident is Pragneshkumar Mohanbhai Meckwan, aged about 24. The incident took place, at 9.30, in the morning, at the town of Matar, situated in the District of Kheda, about 40 Kms., away from Ahmedabad, and about 15 to 18 Kms. away from Kheda District Headquarter. Deceased Pragneshkumar and original accused No.2 Pushpaben, daughter of Dahyabhai Ashabhai Khristi Parmar original Accused No.1 were in love with each other. The family of Pragneshkumar and the family of Pushpaben, both reside in Khristi Falia, at the town of Matar.

5. It is the prosecution case that once Pushpaben, during night time, climbed pipe of the house of

Pragneshkumar and reached to the residence of Pragneshkumar. However, the relationship was not approved by their elders and Pushpa was persuaded to return back to her parents, but Pushpa ran away from the town in the darkness of the night, and then, she was followed by Pragneshkumar. Both of them eloped and stayed together for some time. Father of Pushpa lodged a complaint against Pragneshkumar and his father under Section 363 and 366 of the IPC. Pushpa and Pragneshkumar, both were apprehended by police during investigation. Pushpa was handed back to her parents and Pragneshkumar was released on bail in that offence. This incident occurred during, somewhere, in January, 1992.

6. Shortly, thereafter, the unfortunate incident occurred on 15th February, 1992. As per the prosecution case, and the statement which came to be recorded of the deceased, it was revealed that, Pragneshkumar was going towards market in the town of Matar. When he was passing through the way, accused No.2 Pushpaben Ashabhai Khristi, accused No.1 Dahyabhai Ashabhai Khristi and other accused rounded him in anticipation of quarrel with the deceased. Thereafter, accused No.2 Pushpaben sprinkled kerosene upon deceased Pragneshkumar. One of the persons from the group of 11 accused, ignited the match stick and lighted fire on the body of Pragneshkumar. His whole body came to be ablazed. Deceased Pragneshkumar received serious burn injuries to the extent of 90% second and third degree burns. Somebody informed Ramilaben, Court Witness No.1 Exh.89, sister of the deceased, that his brother was burning. She ran out of her house, and went to the place where Pragnesh was fallen down. The place was jut opposite to the house of one Chandrakantbhai. Immediately, husband of Ramilaben and the brother of the deceased Jaykarbhai Mohanbhai Mecwan PW-4 Exh.61 was called upon from the shop, where he was serving, and he immediately came to the incident. Pragnesh told to his brother that he be taken to the Police Station because he wanted to make a statement. Jaykar along with his relative Lataben, took Pragneshbhai to the Matar Police Station, where Court witness No.3 PSI, I.M.Kumpawat was present. He was requested to record the complaint of Pragneshkumar, but Mr.Kumpawat advised to take Pragneshkumar to the hospital at Kheda, and he said that he would record the complaint later on. Father of deceased - Mohanbhai Kalidas Mecwan was not present in the town and he was at Baroda on the fateful day. On way to Kheda Hospital, on an inquiry, Pragneshkumar conveyed to Jaykarbhai that while he was passing through the way, Pushpaben hold him and her relatives rounded him up. Pushpa sprinkled kerosene on his body and somebody from

the crowd of the accused ignited him to flames. At about 10.00 a.m. Pragneshkumar reached to Kheda Hospital, where he was admitted and treated by Dr. Sanjay Vasantrao Kolte - PW2 -Exh.46. On inquiry, Pragnesh stated before Dr. Kolte that while he was passing through the road, Dahyabhai Ashabhai Khristi, Hasmukhbhai, Rameshbhai, Ramilaben, wife of Hasmukhbhai, Pushpaben, daughter of Dahyabhai Ashabhai, Elisaben and Sulemanbhai Daudbhai, all rounded him up, Pushpa sprinkled kerosene and somebody from the crowd of the accused, put him to flames. The Doctor recorded the case history on Medico Legal Case Paper and informed Kheda Town Police Station. At Kheda Town Police Station, Head Constable - Bhimsinh Chaturbhai, noted the information in the Telephone Register and in the Station Diary, and Yadi was sent to PSI - Vinodbhai Ramjibhai Toliya of Kheda Town Police Station. Simultaneously, a Yadi was also sent to the Executive Magistrate, Kheda, for recording of the Dying Declaration. At 10.20, PSI Kheda Town Police Station - Vinodhbhai Ramjibhai Toliya received Yadi and in pursuance of this, PSI Toliya immediately reached to the Kheda Hospital. He inquired about the injured and about his conditions from the Doctor. He was assured by the Doctor that the injured was fully conscious and, therefore, Toliya recorded the statement of deceased Pragneshkumar, which is at Exh.29. In the said statement Exh.29, Pragneshkumar stated the story that Pushpaben sprinkled kerosene on his body and somebody from the accused put him to fire. In this statement before Toliya, he named following persons as accused:

(i) Dahyabhai Ashabhai Khristi
(ii) Pushpaben Ashabhai Khristi
(iii) Rameshbhai Ashabhai Khristi
(iv) Hasmukhbhai Ashabhai Khristi
(v) Ramilaben Hasmukhbhai

(vi) Elisaben Yusufbhai
(vii) Suleman Daudbhai
(viii) Daudhbhai Shivabhai Khristi
(ix) Mariyam Ashabhai Shivabhai

7. It was also stated by the deceased that these persons quarreled with him, and ultimately, he was put to fire after pouring kerosene. PSI Toliya obtained left hand thumb impression of the deceased on the statement as he was unable to put his signature and Doctor also put his endorsement to the effect that the patient was conscious and he could give statement, and the statement was taken before him and that both the palms were burnt, the patient was unable to sign and hence left hand thumb

impression was obtained on the statement. Thereafter, in pursuance of Yadi of the Kheda Police Station, Ashwinbhai Vasudev Dave, PW3 Exh.58, Executive Magistrate, Kheda, reached to Kheda Civil Hospital at 11.05 a.m. for recording of the statement of the deceased Pragneshkumar. He ascertained from the Doctor and inquired whether the patient was conscious enough to give his statement. Doctor gave positive opinion, and hence, the Executive Magistrate Mr. Dave went to the ward, in which the patient was kept. At 11.10, he started recording of Dying Declaration of deceased Pragneshkumar in question and answer form. In this Dying Declaration also, the deceased gave the same story and gave the names of Dahyabhai Ashabhai, Pushpaben, Hasmukhbhai, Rameshbhai, Ramilaben Hasmukhbhai, Elisaben, etc. On further inquiry, he also stated the names of Suleman Daudbhai, Daudhbhai Shivabhai, Mariyamben Ashabhai, Gersombhai Yakubhai, to be the persons, who rounded him up, and set him to fire. This Dying Declaration is on record at Exh.60, was read over to deceased, was completed at about 11.45

8. According to Doctor, injuries of deceased Pragneshkumar were serious to the extent of 90% second and third degree burns. His condition became serious and, therefore, Dr. Kolte had advised to transfer the patient to Vadilal Sarabhai Hospital or L.G. Hospital, at Ahmedabad, for better treatment. It appears that Pragnesh was taken to Ahmedabad at Vadilal Sarabhai Hospital and was admitted at about 1300 hours on the same day. There also, Ellisbridge Police Station was informed by Doctor and arrangements were made by Ellisbridge Police Station for recording of Dying Declaration of Pragneshkumar. In pursuance of Yadi from the Ellisbridge Police Station, Executive Magistrate, Ahmedabad, Mr. Patel Suryakantbhai Shivrambhai, PW-7, Exh.73 at 1505 hours reached to Vadilal Sarabhai Hospital, wherein deceased Pragneshkumar was kept in Jain ward. Executive Magistrate Mr.Patel Suryakantbhai Shivrambhai ascertained from the ward Doctor that whether the deceased was conscious and in a state of mind of giving statement. When he started recording of Dying Declaration at 1510 hours, he found Pragnesh conscious and he was able to speak. Pragnesh narrated his name and address. Further, Pragnesh narrated that Pushpaben Dahyabhai poured kerosene on him. Thereafter, Executive Magistrate could not record the Dying Declaration because the condition of the patient became serious and Pragneshkumar could not further speak. The Dying Declaration to this extent recorded by the Executive Magistrate - Mr. Patel Suryakantbhai is produced at Exh.75. It appears that,

thereafter, soon Pragneshkumr died in V.S.Hospital, Ahmedabad and Inquest Panchnama by Ellisbridge Police Station was drawn and the postmortem was performed by Dr. Ravindra S. Bhise, Doctor Associate, in the Department of Forensic Medicine Science in V.S.Hospital on 15th February, 1992, at about 1745 hours, which was completed at 1830 hours. PW6 Exh.71 Dr. Ravindra S. Bhise produced Postmortem Notes at Exh.72. As per this Note also, deceased had 90% second and third degree burns and the cause of death was "Shock following burns".

9. However, this is an exceptional case of more than one investigations. In chronological order of events taken place, facts of both the investigations are required to be narrated.

As aforesaid, on receiving information from Civil Hospital, Kheda, Town Police Station of Kheda, in turn, informed Matar Police Station by Vardhi. At about 10.30 on 15.2.1992, it is revealed that Matar Police Station, made arrangements to send Head Constable of Matar Police Station - Dalpatsinh to Kheda Civil Hospital for necessary action. In the meantime, PSI Kumpawat of Matar Police Station, who has played a star role in the prosecution story, reached Matar Police Station at 10.40. He was examined as Court Witness No.3 - Exh.91. According to him, in pursuance of this Station Diary entry of Matar Police Station, receiving information from Kheda Town Police Station, he rushed, for the reasons best known to him, to the scene of incident, where according to this witness, Ramilaben, Court Witness No.1, was present, in the house of Pragneshkumar, who identified the place of incident to be the backyard of the house of Pragneshkumar. PSI Kumpawat with two panchas prepared the panchnama of the scene of incident to be the backyard of the house of Pragneshkumar and that panchnama is produced at Exh.35, and it is mentioned in the panchnama that the place of incident was shown by Ramilaben Jaykarbhai, where there was a smell of kerosene, two buckets were found full of water and water was smelling kerosene. This panchnama denotes that this is the place where deceased Pragneshkumar poured kerosene on himself and committed suicide. One small mug was also found smelling of kerosene, and according to this panchnama, Ramilaben Jaykarbhai stated that the mug belonged to her. Mr. Kumpawat, PSI, recorded several statements and at about 12.00 he entered an accidental death entry in Matar Police Station Diary. No offence was registered by him against any of the accused. He prepared a report of accidental i.e. suicidal death and submitted the same to his superiors. This was one

investigation or an enquiry in the matter.

10. In the meantime, Mohanbhai Kalidas Mecwan, father of deceased Pragneshkumar, reached Matar, in the evening of 15th February, 1992, where dead body of Pragnesh was brought and came to know about the unfortunate incident. He also came to know that this was not and accidental death. He attempted to vent his grievances before the concerned authorities till the level of Home Ministry, repeatedly requesting that the death of his son was an offence and not an accidental death. He filed so many applications, and couple of applications are on record, implorement which shows the outcry and of the agony of the helpless father, whose son was brutally burnt alive. It appears that as late as in April 1992, some authorities took the grievance of the father of the deceased Mohanbhai Kalidas Mecwan, in consideration and in pursuance of that, Divisional Police Superintendent Mr. Naik ordered Mr. Fatesinh S. Kant, Circle Police Inspector to contact Mohanbhai Kalidas Mecwan and to give him an opportunity of being heard in the matter. In this exercise, on 27th April, 1992, First Information Report i.e. complaint of Mohanbhai Kalidas Mecwan came to be recorded by Mr. Khant, Circle Police Inspector, regarding the homicidal death of his son, which was registered at Matar Police Station, vide Matar Police Station Crime Register No.83 of 1992 and investigation came into motion. CPI Mr.Khant investigated this crime, obtained Dying Declarations of the deceased, recorded the statements of the witnesses and came to believe that a homicidal death was committed. Therefore, a charge sheet came to be filed before the learned J.M.F.C., Matar, for the offences punishable under Section 302 read with Section120-B of the IPC. The case being triable by the Court of Sessions, the case was committed to Court of Sessions, Kheda at Nadiad. In the above said charge sheet, following 11 persons were the accused :

(1) Dahyabhai Ashabhai Khristi Parmar
(2) Pushpaben, daughter of
Dahyabhai Ashabhai Khristi Parmar
(3) Ravinaben, Wife of
Dahyabhai Ashabhai Khristi Parmar
(4) Hasmukhbhai Ashabhai Khristi Parmar
(5) Ramilaben, wife of
Hasmukbhai Ashabhai Khristi Parmar
(6) Rameshbhai Ashabhai Khristi Parmar (now
dead)
(7) Gersombhai Yakubbhai Khristi Parmar
(8) Sulemanbhai Daudbhai Khristi Parmar
(9) Mariyamben, widow of

Ashabhai Morarbhai Khristi Parmar
(10) Daudbhai Shivabhai Khristi Parmar
(11) Elisaben, wife of
Yusufbhai Isudas Khristi Parmar

11. After framing of the charge, since the accused pleaded not guilty, a trial was conducted by learned Addl. Sessions Judge, Kheda at Nadiad, in Session Case No. 195 of 1983. Prosecution examined 11 witnesses :

(1) PW-1 Vinodbhai Ramjibhai Toliya, Exh.27
(2) PW-2 Dr.Sanjay Vasantrao Kolte, Exh.43
(3) PW-3 Ashwinbhai Vasudev Dave, Exh.58
(4) PW-4 Jaykarbhai Mohanbhai Mecwan, Exh.61
(5) PW-5 Mohanbhai Kalidas Mecwan, Exh.62
(6) PW-6 Dr.Ravindra S. Bhise, Exh.71
(7) PW-7 Patel Suryankantbhai Shivarambhai Exh.73
(8) PW-8 Jakibhai Kalidasbhai Mecwan, Exh.75
(9) PW-9 Bhimsinhbhai Chaturbhai, Exh.78
(10) PW-10 Kailashben Ambalal, Exh.79
(11) PW-11 Fatesinh S.Khant, Exh.82

and also relied on documentary evidence produced. After the evidence was over, learned Addl. Sessions Judge thought that for just decision of this case, some more witnesses were necessary to be examined, which have not been examined by the prosecution and, therefore, learned Addl. Sessions Judge passed order, produced at Exh.85, to examine the following three Court Witnesses:

(1) Court Witness No.1 Ramilaben Jaykarbhai Exh.89
(2) Court Witness No.2 Lataben Jakhibhai Exh.90
(3) Court Witness NO.3 I.M. Kumpawat - Exh.91

12. After hearing both the sides, learned Addl. Sessions Judge came to the conclusion that accused No.2 Pushpaben appears not to have taken part in the incident willingly and since accused No.3 Ravinaben, wife of Dahyabhai Ashabhai Khristi; accused No.7 Gersombhai Yakubbhai Khristi; and accused No.9 - Mariyamben, widow of Yasufbhai Isudas Khristi, were not named in the Dying Declaration recorded by Dr.Kolte, accused No.2 Pushpaben, accused No.3 Ravinaben, accused No.7 Gersombhai Yakubbhai and accused No.9 Mariyamben, were required to be acquitted, and hence, learned Addl. Sessions Judge acquitted these four accused, while accused No.6 Rameshbhai Ashabhai Khristi Parmar expired during pending the trial, the trial came to be abated against him. Remaining accused - accused No.1 Dahyabhai Ashabhai Khristi Parmar, accused No.4 Hasmukbhai Ashabhai Khristi Parmar, accused No.5 Ramilaben, wife of Hasmukhbhai

Ashabhai Khristi, accused No.8 Sulemanbhai Daudbhai Khristi Parmar, accused No.10. Daudbhai Shivabhai Khristi Parmar and accused No.11 Elisaben, wife of Yusufbhai Isudas Khristi Parmar, came to be convicted by learned Addl. Sessions Judge for the offences punishable under Section 302 read with Section 120-B of the Indian Penal Code and punished each of them for life imprisonment and fine, both. This judgment and order is dated 8th June, 1998.

13. Being aggrieved and dissatisfied with the above said judgment and order of the learned Addl. Sessions Judge, Kheda at Nadiad, in Session Case No. 195 of 1993, original accused No. 5 Ramilaben, Wife of Hasmukhbhai Ashabhai Khristi and original accused No. 11 Elisaben, wife of Yusufbhai Isudas Khristi, both filed Criminal Appeal No. 591 of 1998, while original accused No.1 Dahyabhai Ashabhai Khristi, original accused No.4 Hasumukhbhai Ashabhai Khristi, original accused No.8 Sulemanbhai Daudbhai Khristi, and original accused No.10 Daudbhai Shivabhai Khristi, preferred Criminal Appeal No.686 of 1998.

14. Both the appellants i.e. Ramilaben and Elisaben of Appeal No.591 of 1998 are on bail by an order of this court, while 4 appellants of Appeal No. 686 of 1998 are in jail. Since, both the appeals have arisen from the same judgment and order, require to be heard together and disposed of by this common judgment.

15. Before we deal with the contentions, it is required to be noted that when appeals came up for hearing before this court, Criminal Misc. Application No. 2618 of 1999 was filed by the appellants for invoking the provisions of Section 391 of the Code Criminal Procedure, 1973. After hearing the appellants and the respondent State, vide order dated 1st July, 1999, in that Misc.Criminal Application, this court ordered that additional evidence, in the interest of justice, be recorded by the trial court as per the request of appellants. Record was transmitted to the trial court. Thereafter, trial court recorded evidence in shape of defence of the original accused. Accordingly, Criminal Misc. Application No. 480 of 1999 was filed before the Sessions Judge at Nadiad, in Session Case No. 195 of 1993, and in pursuance of the order passed thereon, three defence witnesses were examined on behalf of original accused No.1 Dahyabhai Ashabhai Khristi and original accused No.8 - Suleman Daudbhai Khristi, respectively, in Criminal Appeal No. 686 of

1998. The witnesses who are examined by the defence are as under :

DW.1 -Exh.9 - Balkrishna Bhailalbhai Khadiya, Deputy Engineer in Irrigation Department, in which Suleman Daudbhai was working as Assistant, and a fact is sought to be established that on the date of the incident, original accused No.8 Suleman Daudbhai was at his place of duty. He has produced a certificate - Exh.10.

Exh.12 Defence Witness No. 2 was examined at Exh.12 and he is Chandubhai Dhulabhai Prajapati. He is the Dy. Executive Engineer of Irrigation Department and he signed the certificate at Exh.10, stating that Suleman Daudbhai - accused No.8 was on duty on 15.2.1992.

DW-3 Exh.14 Defence Witness No.3, Exh.14, is examined, and she is Nainaben Rathilal Bhrambhatt, a Clerk in 5th Jt. Civil Judge (SD) Court at Nadiad, who has produced copy of affidavit-in-replies in Civil Suit No. 338 of 1993 and 339 of 1992, filed by Dahyabhai Ashabhai Khristi and Suleman Daudbhai Khristi. Detailed appreciation will be undertaken hereinafter regarding these witnesses.

Defence Witness No.4 is examined at Exh.19 and he is Bhagawanbhai Kanjibhai Makwana. He was Mamlatdar, Krushipanh, Khambhat and from the record he certified that on 15.2.1992, accused No.1 Dahyabhai Ashabhai Khristi effected recoveries of agricultural dues, because he was Talati at that time, from village agriculturists of village Nandoli. Some statements of those agriculturists are produced from Exhibits 22 to 28. This plea of alibi will be dealt with at the appropriate stage.

16. Before we record the contentions canvassed on behalf of the appellants, we would like to state that what should be the approach of the first appellate court when the accused are charged of serious crimes. We are conscious that the appellate court must look into the evidence adduced in the case and arrive at an independent conclusion regarding whether such evidence is trustworthy and could be relied upon, and whether the case of the

prosecution is proved beyond reasonable doubt or not, in such offence. The credibility of witness has to be judged by the appellate court, and drawing inference from proved facts, should no doubt, the appellate court as well like trial court, has to be satisfied affirmatively that the case of the prosecution is substantially true and the guilt of the accused could be proved beyond all reasonable doubts because the presence of innocence of accused starts and continues right through until they are held guilty by the final court of appeal and that presumption could never be strengthened by an acquittal nor weakened by a conviction in the trial. We are conscious that the judicial approach in dealing with the case where the accused is charged of murder under Section 302, has to be cautious, circumspect and careful and, therefore after recording the contentions of the appellants, the evidence on record and all relevant material circumstances are required to be carefully examined, dealing with the contentions of the appellants to arrive at a conclusion that what is acceptable as truth from the prosecution case.

17. Learned Advocate Mr.J.M.Buddhbhatti with learned Sr. Advocate Mr. M.R.Barot for appellant No.1 and Learned Advocate Mr.J.S. Yadav for appellant No.2 in Criminal Appeal No. 591 of 1992 appeared. Learned Senior Counsel Mr. Maganbhai Barot with Ms. Krishna V. Barot, for accused in Criminal Appeal No. 686 of 1998 and learned APP Mr. K.P. Raval for the respondent State in both the Appeals appeared. Learned Senior Counsel Mr. M.R. Barot launched vehement typhoon attacks on the prosecution case and the evidence, which may be summarised as under :

(i) Contemporary record and the documents show that Pragneshkumar died either accidental or suicidal death and the attention was drawn to Yadis written by Kheda Town Police Station to Hospital and Executive Magistrate. Attention is also drawn to Station Diary Entry in Kheda Town Police Station. The fact, which is mentioned in the Diary that Pragnesh got the flames because he was lighting bonfire for protecting himself from cold. Attention is also drawn to Exh. 28 Telephone Vardhi alleged to have been recorded by Head Constable, Kheda Police Station, on receiving information from Dr. Kolte, in-charge Doctor Kheda Civil Hospital. Exh. 31 and 36, Kheda Police Station Diary; Exh.32 Yadi to Executive Magistrate of Kheda; and Exh.37 Entry

of Telephone Register of Matar Police Station. It was contended that in all the above documents, it is stated that Dr. Kolte informed Kheda Police Station that Pragneshkumar, resident of Matar, was burnt while lighting a bonfire for protecting him from cold and he was admitted to the hospital and his general condition was good. P.S.O. Kheda one Bhimsingh, who is examined at Exh.78 as PW9 received above information on phone from Dr. Kolte of Kheda Civil Hospital. He noted the information as Telephone Vardhi which is at Exh.27. Bhimsinh sent a Yadi to Executive Magistrate and also sent Yadi to PSI Tolia, stating the fact of information which he had received from Dr. Kolte. He also made entries to Telephone Register and Station Diary of Kheda Police Station. He also sent the same information to Matar Police Station. It is, therefore, urged that in view of this fact that Dr. Kolte informed about accident occurred to deceased to Kheda Police Station and recorded by Bimsingh as stated above. In the Dying Declaration alleged to have been recorded by Dr. Kolte is nothing but the concoction because as per the above mentioned contemporary documents, the contrary fact is revealed that Pragneshkumar died either by suicidal or accidental death. It was urged that due to this contemporary documents, all the Dying Declarations become highly suspicious and not worthy of credence. It is also urged that except those Dying Declarations of the deceased, there is no other evidence to connect the accused with the crime. It is vehemently urged that due to this contemporary records denoting the death by accident. It is urged that these records are the of the evidence of prosecution itself. Thus, there is evidence of prosecution contrary to each other regarding the incident and the benefit of this must go to the accused.

(ii) It is forcefully urged that the first investigation i.e. an inquiry for the accidental death under Section 174 was undertaken by Mr. Kumpawat, PSI, Matar Police Station, is an honest and prompt and immediate investigation, which

must be believed. It is urged that on receiving the information from the Station Diary of Matar Police Station, Mr. Kumpawat went to the place of incident at at 10.15 i.e. soon after the incident, a panchnama is drawn, which is produced at Exh.35. It is urged that this fact has come in the evidence from the mouth of the complainant that the panchas of this panchnama are honest and they would not sign wrong papers. It is also urged that there is nothing on the record to show that Kumpawat acted prejudicially to the complainant. He also recorded the statements of the neighbours, who supported the panchnama Exh.35, in which it is clearly laid down that the deceased committed suicide. It is urged that none of the higher officers of Mr. Kumpawat, at any point of time objected to the investigation carried out by him. It is further urged that Matar Police Station was informed about statement of deceased Exh.29 (Recorded by Tolia) on 16.2.1992 at 12.00 p.m. as per the deposition of Court witness Kumpavat. It is not established that when Dalpatsinh handed over the papers i.e.Exh.29 to Matar Police Station because Dalpatsinh who was sent to Kheda Hospital by Matar Police Station, has not been examined by prosecution. It is urged that till the next date i.e. upto 16th February, 1992 Mr. Kumpawat was not informed by any one that deceased had given statements and the statements were never brought to the notice of Mr. Kumpawat. It is submitted that therefore, reliance must be placed on investigation of Mr Kumpawat and the panchnama drawn by him at Exh.35 - i.e. scene of incident and taking into consideration this panchnama, all the Dying Declarations of the deceased become highly doubtful to the extent that the same may be concoction.

(iii) An endorsement of the Doctor regarding the fitness of mind has not been obtained on Exh.29 i.e. a complaint recorded by PW1 - Vinodbhai Ramjibhai Toliya of Kheda Police Station. Therefore, it is submitted that this Dying Declaration must be excluded from consideration. It is submitted that so far as all the 4 Dying Declarations are concerned i.e. Exh.29 and Exh. 47 certificate of injuries, Exh.59 Dying Declaration recorded by Executive Magistrate Ashwinbhai Vasudev Dave - PW3 and Dying Declaration recorded by Executive Magistrate,

Ahmedabad, PW7 - Patel Suryakantbhai Shivarambhai - Exh.73, it appears that there is infirmity of improvements and contradictions. In Exh. 29, 10 names of the accused are mentioned. In Exh.47 recorded by Dr.Kolte, names of Mariyamben and Gerosmbhai Yakubbhai are not given while in Dying Declaration at Exh.60 recorded by Executive Magistrate, Kheda, some names were given, and thereafter, on inquiry by Executive Magistrate whether anybody else was involved, other names were given. There are contradictions in all Dying Declarations regarding the manner of occurrence of the incident. Therefore, no reliance could be placed on any of the Dying Declarations.

(iv) It is urged that in the evidence of PW4 Jaykarbhai Mohanbhai Mecwan - Exh.61, brother of the deceased, it is revealed that he obtained Vardhi (probably an Yadi) from Kheda Hospital for better treatment to Ahmedabad V.S. Hospital. This Yadi is not produced. But, Yadi at Exh.74 is produced, which is forwarded to the Executive Magistrate of Ahmedabad Mr. Patel Suryakantbhai Shivarambhai by Ellisbridge Police Station. Exhibit 74 Yadi denotes that Ellisbridge Police received information through Saburbhai, Head Constable, Ellisbridge, Ahmedabad Police Station from the Doctor of V.S. Hospital that one Pragneshkumar, resident of Matar, was burnt at his house and was admitted in the hospital. It is, therefore, submitted that this is one more circumstance for not to believe the theory of prosecution resting on Dying Declarations involving appellants and therefore that the Dying Declarations either, in fact, were not recorded at all, and are concoction afterwards, or that, the same are not the true version of the deceased. In any case, it is urged that the benefit must go to the accused. It is further urged that Exh. 35 and Exh. 33, both the panchnamas have been admitted by the defence during the trial and have been exhibited.

(v) So far as PW-3 Ashwinbhai Vasudev Dave - exh. 58 is concerned, and the Dying Declaration, which he recorded at Exh.60 is concerned, it is submitted that in evidence, the Dying Declaration was read over to the witness. The copy of this Dying Declaration was given to Mr. Kumpawat only 24th

March, 1992 and before that, this copy was not handed over to PSI Kumpawat, Matar Police Station. This Investigation Officer was not aware of this Dying Declaration. This witness, it was submitted that could not be believed because the approach of the witness was so casual that he did not inform the police about the Dying Declaration which he kept with himself, and also there were erosions on the back side of the Dying Declaration, for which, the witness could not offer any explanation. It is further submitted that the Executive Magistrate for the reasons best known to him, attempted to elicit names of other accused from the deceased. It was further submitted that if the language of the Dying Declaration - Exh.60 is taken into consideration, it was impossible for the deceased with 90% burns to say emphatically the sentence that " I repeat that the offenders should be punished, for that I repeatedly request you all to take necessary action etc." It is submitted that such dramatic noting is quite unnatural in the mouth of a dying person, who was suffering from physical pains and shattered mental condition. Dying Declaration Exh.60, therefore, is not trustworthy.

(vi) It was further submitted that in view of the information, he relayed to Kheda Town Police Station by telephone, and which is proved vide Yadi - Exh.28 regarding accidental burn injuries to Pragneshkumar, Dr. Kolte is not trustworthy witness, because he made obvious diversion in recording of the case history of homicidal death, from what he conveyed to Kheda Police Station. It is in contradiction of the information he relayed, which is proven by the Yadi at Exh.28. In this respect, our attention was also drawn to Modi's Medical Jurisprudence and Toxicology, Twenty-first Edition, page 233 wherein "Rule of Nines" for Estimating Percentage of Body Surface involved in Burns" is explained. It is submitted that accordingly, Pragnesh sustained 90% burn injuries. Again, our attention was drawn to Exh.72 Postmortem Note and it was argued that the brain was found congested. Larynx, Trachea and Brochi were found with black sooty. Right lung was found congested. Even, there was second and third degree burns on the throat of the patient, which must have affected the vocal cords. It is, therefore, submitted that these all indicates very severe injuries on the body of deceased

Pragneshkumar and reasonably in all probability, deceased Pragneshkumar could not be said to have been in a fit physical and mental state of mind to give a statement in a manner, which he has given with vigorous utterances. Therefore, it is submitted that all the Dying Declarations are not truthful evidence to convict the accused.

(vii) It is submitted that PW-6 Dr. Ravindra S. Bhise Exh.71, deposed that sole of feet were burnt. It is submitted that if the kerosene was poured by somebody else, this would not have been possible. It is possible only when kerosene is poured by the deceased himself, and then only, the sole of feet can be burnt. It is submitted that further in last line of his deposition, Dr.Bhise has exhibited the probability and possibility of suicidal injuries. Therefore, it is urged that in view of the deposition of Dr.Ravindra S. Bhise, no reliance can be placed on Dying Declaration.

(viii) Much has been said about PW-5 - Mohanbhai Kalidas Mecwan - Exh.62 and about his conduct. It is alleged that due to the threats of this witness against the police through his representations he made to the higher authorities, second investigation came to be initiated and the present appellants along with other accused came to be implicated falsely in the offence. It is alleged that the Second Investigating Officer investigated the offence as per the say of this witness. It is also urged that this witness had given a statement before Kumpawat on 16.2.1992, which is at Exh.62, wherein he has admitted that Pragneshkumar had suicidal tendency and earlier also he had attempted to consume poison and to end his life. In which it is stated that he has expressed his opinion that Pragnesh might have committed suicide in failure of love.

(ix) It was submitted that in accidental death inquiry, the statement of Ramilaben, Court Witness No.1 at Exh.89 was recorded and this statement is signed by her. In her statement, she has supported the theory of suicidal death and she has admitted that she has shown the scene of incident to Mr. Kumpawat.

(x) It was submitted that none of the Dying

Declarations refers that Pragneshkumar along with Jaykarbhai and his aunt Lataben visited first Matar Police Station. Therefore, the theory that Matar Police Station did not record the complaint, could not be believed, and that the accidental death inquiry undertaken by Mr. Kumpawat is spotless and germane.

(xi) It was submitted that Patel Suryakantbhai Shivrambhai, Executive Magistrate, Ahmedabad, PW-7, Exh.73, has stated that deceased took about 15 minutes to reply his question. This denotes the mental as well as the physical condition of the deceased and must be taken into consideration while appreciating the evidence.

(xii) It is further submitted that all the Dying Declarations suffers from above said infirmities, finds no corroboration from any other evidence, and therefore, none of the Dying Declarations could be believed. It is further submitted that panchas of the Inquest Panchnama and one of them Jayantibhai was related to the complainant. It is in the evidence that Jayantibhai knew that the death of Pragneshkumar was homicidal, even then, this panch being related to the complainant, in Inquest panchnama, did not object to recording that Pragnesh received burn injuries at his own house. It is submitted that this denotes that either there was no existence of any of the Dying Declarations as stated by the prosecution, or that, the true version is not recorded by the concerned witnesses. It is submitted that, therefore, none of the Dying Declarations is free from suspicion and must not be believed. Our attention was also drawn to Exh.71 i.e. the Police Report sent to the Hospital with dead body and Exh.34 i.e. both are the same document. It is submitted that Cl.No.10 of Exh. 71 Report denotes that the probable cause of death was the burn injuries and the dead body was sent to the Doctor for ascertaining the exact reason of the death. This whole Note is proved by Dr. Ravindra S. Bhise.

(xii) Regarding charge of conspiracy, it was submitted that accused No.2 Pushpaben is the daughter of Dahyabhai Ashabhai Khristi - accused No.1,

accused No.5 - Ramilaben is the aunt of Pushpaben. Even accused No.9 - Mariyamben is the grandmother of Pushpa and they all are involved. It is submitted that in all, originally out of 11 accused, 5 accused are women. It is submitted that considering this and other circumstances as narrated above, it could not be believed that grandmother and other relatives would hatch a conspiracy. It is submitted that accused appellant Elisaben is neither a relative nor a neighbour of accused No.1 Dahyabhai, and for no reason on the earth she would involve herself in a conspiracy. It could not also be believed that 5 women out of 11 accused conspired and agreed to burn the deceased alive. A combination of the accused itself makes the case doubtful, let alone the case of conspiracy.

(xiii) It was further argued by learned counsel Mr. Barot that in additional evidence, four witnesses have been examined as defence witnesses. It is stated that defence witness No.1 - Exh.9 Balkrishna Bhailalbhai Khadia, and defence witness No.2 - Exh.12 - Chandubhai Dhulabhai Prajapati, fairly established that on 15.2.1992, accused No.8 Suleman Daudbhai Khristi was on duty at village Khada, and was not at the scene of offence at Matar. It is further submitted that as per the deposition of defence witness No.1 Exh.9, Balkrishna Bhailabhai Khadia, it is revealed how the investigating agency has acted under the threats of the complainant. It is submitted that this witness Balkrishna Bhailalbhai Khadia, vide Exh.9, deposed that on Exhibit-10, which is the certificate of the presence of accused No.8 Suleman Daudbhai Khristi, Deputy SP Mr. Ravani, under threats of killing, obtained an endorsement from this witness that accused No.8 was, in fact, not on duty, while the contents of Exh.10 denotes that accused No.8 Suleman Daudhbhai Khristi at the time and on the date of incident, was on his place of duty.

(xiv) Similarly, it is urged that accused No.1 Dahyabhai Ashabhai Khristi and accused No.8 Suleman Daudbhai Khristi, both filed suits against the Government for injunction restraining Government from suspending them due to FIR

registered against them, being Civil Suit Nos. 338 and 339 of 1992 respectively. It is submitted that defence witness No.3 Naynaben Rathilal Bhrambhatt - Exh.14, has produced vide Exhibits 15 and 17, affidavit-in-replies filed on behalf of Government in the above said suits and in the above said suits, in affidavit in para 13, it was admitted by the defendant Government that on the date of the incident, accused Nos.1 and 8 were on their respective duties.

(xv) It is further submitted that Defence Witness No.4 Bhagwanbhai Kanjibhai Makwan - Exh.19, also in deposition, issued a certificate - Exh.29, which denotes that on 15th February, 1992, accused No.1 Dahyabhai Ashabhai Khristi was at village Nandoli with Sarpanch and they have effected recoveries. Vide Exhibits 22 to 28, statements of agriculturists are also produced. Defence Witness No.4 is the Mamlatdar, Irrigation Department and he has issued certificate at Exh.29 to the effect that accused No.1 Dhayabhai Ashabhai Khristi has effected recoveries on 15.2.1992 from the concerned agriculturist and he was at village Nandoli and not at Matar, at the scene of incident. It is urged that in view of this defence of the accused No.1 and accused No.8, it is established that both the accused were at a distance from the scene of incident on the date of incident. It is urged that this evidence of alibi is amply established, and since it is established that these two accused were not present at the scene of incident at the relevant time, the whole case of the prosecution becomes doubtful.

18. Learned Advocate Mr. Buddhbhatti for appellant No.1 in Criminal Appeal No. 591 of 1998 urged that he adopts the argument advanced by learned Senior Counsel Mr. Barot and further has drawn our attention to Sections 32 and 158 of the Evidence Act. It was urged that as contended above, the story of the prosecution is unbelievable. The statement of the deceased requires close scrutiny and it is not the rule of law that whatever deceased says, is to be accepted as truth. It is urged that while any matter is sought to be proved under Section 32 or 35 of the Evidence Act, the matters to impeach or confirm the credit of the person, by whom the statement was made, might be relevant or proved, as

if, that person was called as a witness and had denied upon cross-examination the truth of the matters. It is therefore argued that there are suspicious circumstances and inconsistent Dying Declarations, which casts doubt on the creditworthiness of the maker of the Dying Declarations. In such circumstances, without corroboration from independent evidence, the Dying Declarations cannot be relied upon. Mr. Buddhbhatti to discredit the statement of the deceased, relied upon the circumstances as narrated by learned Counsel Mr. Barot. It was urged that the story narrated by the deceased is inherently improbable because the place of incident as advanced by the prosecution is a populated area, and no witnesses are forthcoming. A fact also is required to be considered that deceased had suicidal tendency. There is independent alibi of the two accused, which makes the prosecution case doubtful, and ultimately, the creditworthiness of the statement of the deceased is impeachable, and therefore, it is urged that no reliance can be placed on the statement of the deceased in these circumstances.

19. Learned Advocate Mr. J.S. Yadav for original accused No. 11 and appellant No.2 Elisaben, of Criminal Appeal No. 591 of 1998, has contended that Elisaben is neither relative of the accused nor residing in the vicinity of the house of the accused No.1. The name of Elisaben is not mentioned in the FIR given by the complainant nor Elisaben was shown to be the participant in crime while the complainant preferred his representations to the higher authorities. It was urged that the deceased was literate person, even though, a thumb impression is obtained on all the Dying Declarations. It is urged that the medical evidence discloses that the palms of the deceased were burnt. In these circumstances, there will be no clear thumb impression due to burn injuries. It is submitted that even though while scrutinising the thumb impression on all the Dying Declarations, the impression is very clear. This creates a doubt. The complainant, in his deposition has admitted that deceased Pragneshkumar might have given the name of Elisaben in some error. Learned Advocate Mr. Yadav has relied upon a decision of the Apex Court in the case of STATE OF PUNJAB vs. GIAN KAUR, reported in 1998 Cri.L.J. 2061, wherein thumb impression on dying declaration was found inconsistent with the prosecution case due to 100% burn injuries.

20. Learned Counsel Mr. Barot and learned Counsel

Mr. Buddhbhatti, both relied upon the following cases :

(i) AIR 1981 SC 765, in the case of SHANKARLAL GYARASILAL DIXIT vs. STATE OF MAHARASHTRA, to show that the accused not bound to answer as to why witnesses deposed against him.

(ii) AIR 1964 SC 1563 in the matter of DAHYABHAI CHHAGANBHAI THAKKAR vs.STATE OF GUJARAT, wherein it is observed that in defence accused is required to show preponderance of probability and not to prove a fact beyond reasonable doubt.

(iii) AIR 1990 SC 1628 in the matter of B.N. SINGH vs. STATE OF GUJARAT, wherein it is observed that one of the accused is found to be falsely implicated and, therefore, the benefit should go to other accused.

(iv) AIR 1976 SC 1995 in the matter of K.RAMACHANDRA REDDY vs. THE PUBLIC PROSECUTOR, which was relied on for the purpose that when conviction solely on dying declaration can be based and permissible. It was further argued basing on this authority that the deceased had earlier opportunity to make Dying declaration, but he has not made it and, therefore, subsequent Dying Declaration must be viewed with suspicion.

21. Learned APP Mr.K.P.Raval has, vehemently, supported the judgment and order of the learned Addl. Sessions Judge. It was urged that the complaint recorded by Vinodbhai Ramjibhai Toliya, Kheda Town Police Station, and the case history of Dr. Sanjay Vasantrao Kolte, both are, also, Dying Declaration and all the Dying Declarations are free from any doubt. It is urged that it is impossible for the person on the death bed to implead falsely all the accused person. It is further submitted that there is nothing on the record, in fact, to put the Dying Declarations in suspicion. No witness connected with the Dying Declaration could be shaken in the cross-examination as to come to the conclusion that they were not truthful witnesses. It is urged that the Criminal Appeals be, therefore, dismissed.

22. Now, having regard to lengthy rival contentions and considering the prosecution case, it is settled that the case of prosecution rests solely on 4 Dying Declarations i.e. Exh.29 - a complaint recorded by PSI

Toliya of Kheda Police Station, Exh.47, case history recorded in medical case papers by Dr. Sanjay Vasantrao Kolte, Exh.60 - Dying Declaration recorded by Ashwinbhai Vasudev Dave, Executive Magistrate at Kheda and Dying Declaration recorded by Patel Suryakant Shivrambhai, Executive Magistrate, Ahmedabad. Exhibit 47 first in point of time came to be recorded. Thereafter, Exh. 29, Exh.60 and Exh. 74 came to be recorded. Therefore, the core question, which arises for consideration is whether reliance can, safely, be placed upon the Dying declarations of the deceased. The law regarding appreciating Dying declaration is, now, settled, though, each case rests upon its own merits and facts.

23. The presumptions that the situation of a man seriously injured in doldrums between life and death, on death bed, is so solemn and serene that veracity of the statement of deceased is accepted without him being cross-examined, and the fact that, the statement offered in grave dying position, has great solemnity and sanctity to such statement, and for this reason, the requirement of oath and cross-examination are dispensed with. In these circumstances, if the Dying declaration if excluded without any justifiable and recognised ground, from the consideration, the same will result in miscarriage of justice because in such cases, the victim happens to be generally the only eye witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence. On the other hand, it is worthwhile to note that the accused has no opportunity to cross-examine a dying person. Therefore, though the Dying declaration is entitled to great weight, but courts even though insist that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court should satisfy that the statement of the deceased was not as a result of either tutoring, prompting or a product of imagination. The Court should also satisfy that the deceased was in a fit state of mind after a clear opportunity to observe and identify the accused. Once the Court is satisfied that the Dying declaration is a truthful piece of evidence, it is always open to the Court to convict the accused on this basis without even an independent corroboration. The rule requiring corroboration is merely a rule of prudence and not rule of law. Therefore, once the court is satisfied with regard to the truth and genuineness of an uncorroborated dying declaration, there is nothing to prevent it from regarding such a declaration solely sufficient to sustain conviction.

24. From the various decisions of the Apex Court, the law emerges for the test and the appreciation of the Dying Declaration, is summarised as under :

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P., 1976 (2) SCR 764 : (AIR 1976 SC 2199).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, 1974 (4) SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P., AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Cri.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement it is not to be discarded. On the contrary, the shortness of the statement itself guarantee truth.(Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).

(ix) Normally, the Court in order to satisfy whether

deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.(Nanahau Ram v. State, AIR 1988 SC 912).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519).

Now, in the light of the above principles, we shall consider the four Dying declarations in the instant case and shall ascertain the truth with reference to all Dying declarations made by deceased Pragneshkumar.

25. With reference to four Dying declarations, important witnesses are PW-1 Vinodbhai Ramjibhai Tolia Exh.27, who recorded the Dying declaration - Exh.29 in the form of complaint, Dr. Sanjay Vasantrao Kolte, PW-2, - Exh. 46, who recorded the case history, vide Exh.47, which is certificate of injuries, PW-3 - Ashwinbhai Vasudev Dave, Executive Magistrate, Kheda, Exh.58, who recorded the Dying declaration at Exh.60 and PW-7, Exh.73, Patel Suryakantbhai Shivarambhai, Executive Magistrate, Ahmedabad, who recorded the Dying declaration vide Exh.75. In this connection, PW-4 Exh.61 Jaykarbhai Mohanbhai Mecwan and Court Witness No.2, Exh.19 Lataben Jakhibhai, aunt of the deceased, are also relevant. Both of them took the deceased Pragneshkumar to Kheda Civil Hospital. First, we shall ascertain that whether the deceased was in conscious and in fit state of mind, so as to give the statement. We will have to ascertain this from the opinion of the expert i.e. medical evidence. According to Dr. Kolte and the injury certificate which he has given at Exh.47 that deceased had following injuries.

(i) IInd degree burn of face, eye lashes and brows and scalp hairs burnt. Both pinna of ear burnt 2nd degree.

(ii) IInd degree burn of anterior, posterior and lateral side of neck.

(iii) IInd degree burn of anterior, posterior and lateral side of chest.

(iv) IInd degree burn of anterior, posterior, lateral abdominal.

(v) IInd degree burn of perineal region.

(vi) IInd degree burn of half portion of general region.

(vii) IInd degree burn of both thighs - complete.

(viii) IInd degree burn of both knees - complete.

(ix) IInd degree burn of anterior, posterior of both legs.

(x) IInd degree burn - few portion of both legs posteriorly.

(xi) IInd degree burn of both upper limb i.e. palm.

26. All these injuries are confirmed by Dr. Ravindra S. Bhise, who performed autopsy. While we consider the evidence of Dr. Kolte, Exh. 46, he has emphatically deposed that the patient was fully conscious. He has further deposed that he meant to say that Pragnesh was mentally sound and was in a position to clearly reply the query. He has been extensively cross-examined by the accused, but nothing has come out to denote that in 90% burn injuries, a person would not be in so mental condition as to state the facts regarding his death. Now "Rule of Nines: as propounded by Modi in his 21st Edition, referred hereinabove, has also been taken into consideration, but nowhere, it is found that due to 90% burn injuries, the mental and physical condition of the patient would be so badly affected that in all probability, it would not be possible for him to understand the question and give reply. Even Modi has also not given such opinion in his recent edition of Medical Jurisprudence and Toxicology. There is no reason to disbelieve Dr. Kolte regarding the mental fitness of the deceased to give a statement. This fact is further corroborated by PW-6 Dr. Ravindra S. Bhise - Exh.71, who has been cross-examined extensively on this point and in cross-examination, he has clearly opined that even in cases of second and third degree burns, a patient can speak. Not only that, this fact is corroborated by PW1 Vinodbhai Ramjibhai Toliya, who has also been deposed that Pragneshkumar was able to speak and was fully

conscious. Further, two Executive Magistrates PW-3 Ashwinbhai Vasudev Dave of Kheda - Exh.58 and PW-7 Patel Suryakantbhai Shivarambhai of Ahmedabad, Exh.73, also corroborated that deceased was conscious and was able to speak. Therefore, from appreciating the evidence of these five witnesses, the only inescapable conclusion would be Pragneshkumar was in fit state of mind to offer his statement and to reply the queries. This important test laid down by the law has been successfully crossed by all the four Dying declarations. There is nothing in the prosecution case nor anything could be shown by the defence that the evidence of these five independent witnesses was not believable as to the physical as well as mental condition of the deceased. It is nowhere laid down that by very reason of sustaining 90% burn injuries and to the extent of second and third degree burns, mental capacity of the deceased is invariably impaired and he would not be in a position to make statement or to answer to the question put to him. It all depends upon the circumstances of a particular case. May be, in some cases, it could be inferred that the injuries impaired and damaged the mental faculties of the deceased. In some cases, like this, on our hand, patient can be conscious and mentally oriented to the last moment of his death, and in these circumstances, when there is no proposition that such burn injuries invariably impairs and damages the mental faculties of the patient, much depends upon the opinion of the experts and attending circumstances. The other two witnesses i.e. Jaykarbhai Mohanbhai Mecwan, Exh.61 and Court Witness No.2 Lataben Jakhibhai - Exh.90, also corroborate that Pragneshkumar was in fit state of mind to make a statement. On this point, therefore, the credence will have to be afforded to all the four Dying declarations.

27. Now again, the question arises that the version which was narrated by the deceased was truthful and whether reliance can be placed upon it. "Nemo moriturus proesumiture mentiri" meaning, thereby, that a man will not meet his Maker with a lie in his mouth and upon the strength of this principle, Dying declarations are admitted in the evidence. Apart from this legal maxim, if four Dying declarations are tested independently with objective appreciation, the fact which emerges, is the narrations of the deceased are, extremely, truthful. The reason is in all the four Dying declarations, the story narrated by the deceased is the same. Wording may be different. In one of the Dying declarations, deceased might not have named couple of accused, would not make a difference that the chain of story which dying boy

maintains is the same from his first utterances to the last, where he narrates that the accused rounded him up, Pushpaben poured kerosene on him, and somebody from the crowd of the accused thrown burning match stick upon him and he was caught by fire immediately. The deceased could have named the accused also, had there been any plan plying in his brain to involve the accused, falsely, instead he narrates very truthfully that, somebody, he could not say and name ignited him. This core genesis of his agony has never been diverted so as to born a conclusion that the deceased made the conflicting statements so as to contradict each other to doubt his veracity. This replies to the contentions raised by the defence that the Dying declarations are inconsistent. On the contrary, it is found that the same story which is narrated is consistent. There may be minor discrepancies in narrating exact manner of the occurrence of the incident. But, this could not be labelled as such discrepancy as to discard the whole evidence. In VAJRALA PARIPURNACHARY vs. STATE OF A.P., reported in (1998) 6 SCC 463, the Apex Court observed in para - 10 as under :

"One of the main reasons to side step Ext. P-12 is that the deceased told the Magistrate that the incident had happened "outside the house". We do not think that much can be read into it as the word "house" used by her need not necessarily be interpreted as the entire building. It could be an interior area of the building or it could be the defect of selecting the equivalent English word for what she used in her own dialect. Even if it is so, it does not matter and on that account, the identity of the assailant is not blurred. The exact spot where she was set ablaze, whether just outside the building or inside, does not affect the credibility of her dying declaration.

In SARWAN SINGH vs. STATE OF PUNJAB, reported in 1997 SCC (Cri) 844, the Apex Court observed as under :

" The arguments of the learned counsel have, regrettably, no foundation. Insofar as the first dying declaration is concerned, the need to record it arose because according to PW2, the Police, though sent for, had not arrived and the condition of the victim was fast deteriorating. He, thus, took steps to record the statement of the deceased. No material has been brought on record from which it could be inferred that the deceased was unable to make any statement

> purported to have been made to the doctor. PW 2, rather, was emphatic that the deceased was in a position to speak and had disclosed to him the names of the accused persons as also the weapons in their hands which were employed to inflict fatal injuries on him. There is no reason to disbelieve him. On his statement alone, the conviction of the appellants can be maintained; let apart the dying declaration recorded by the police. The later dying declaration, as said before contains details pertaining to the motive and the manner of the ghastly occurrence. These cannot be termed to be improvements in the statement from what the statement was before the doctor, material base of the prosecution case remaining the same. Thus, in these circumstances, we are of the view that the High Court was perfectly justified in maintaining the conviction of the appellants for the offences charged and their sentence."

From the above said decisions of the Apex Court, it is clear that the trustworthiness and the veracity of the maker of dying declaration cannot be thrown overboard even if there be some minor discrepancies, when otherwise the same inspires confidence.

28. Prosecution witness No.1 Vinodbhai Ramjibhai Toliya has reached to Kheda Town Police Station at about 10.20 in pursuance of the Yadi received by him from Police Station that Pragnesh was admitted to the hospital for the burn injuries. On reaching the hospital, he met with Dr. Kolte, who was treating the deceased. He ascertained that deceased Pragneshkumar was in a position to speak and offer a statement. He recorded the statement of the deceased wherein he stated that all the 10 accused except Ravinaben, Original accused No.3 rounded him up, accused No.2 Pushpa poured kerosene, and one of the accused put him to fire. He read over the statement to deceased Pragneshkumar and obtained thumb impression of Pragneshkumar. He produced the statement on record at Exh.29. He is put to searching cross-examination of the defence. Nothing could be made out even to suggest that either witness Toliya recorded the statement which was not of Pragneshkumar or that he did not record what was stated by Pragneshkumar and an attempt was made by the defence to dislodge this evidence by stating that when he knew by the statement vide Exh. 29 that a cognizable offence is committed, he ought to

have registered the crime even if the crime did not pertain to his jurisdiction because police has power to register such grave crime and to send the same to the concerned Police Station. Considering this argument, it is clear that this fact by itself would not dislodge the statement of Exh.29 whether witness Toliya attempted to register a crime or not. When the creditworthiness of this witness is found not impeachable the statement he recorded at Exh.29 is found to be true.

29. Like wise, in corroboration of other later Dying declaration, a statement was recorded in first point of time, in the shape of case history, by Dr. Kolte, who got the deceased admitted in the Kheda Civil Hospital and gave treatment. Case paper is at Exh.47. Much is said about this witness by the defence that this Doctor gave information to the Police Station that Pragneshkumar was admitted to Hospital for burnt injuries, which he received while lighting bonfire for protection of cold. The Yadi at Exh.27 and 28, which are recorded by a Constable of Kheda Town Police Station, on an information, which he alleged to have been received through telephone from Dr. Kolte. How far this fact affects the case of prosecution, is discussed hereinafter at length. It is found that this Yadi would not affect the Dying declaration recorded in shape of case history by Dr. Kolte. He has been examined as PW-2 at Exh.46. He deposes that at about 10'O clock on 15th February, 1992, when he was on duty, one person, named as Pragnesh, was brought to his hospital with burn injuries by his relatives. He states that he asked directly to the deceased for the reasons for the burn injuries, and then, Pragnesh gave reasons, which is recorded by him in Exh.47, and in this history also Pragnesh is consistent with his later statements. He says that while he was going to the market, the accused rounded him up, accused No.2 Pushpa poured kerosene and some one from the crowd of the accused ignited the match stick and thrown on him. Doctor noted the injuries as deposed by deceased Pragnesh. Dr.Kolte has also deposed that he was not able to sign and, therefore, a thumb impression was obtained on Exh.29. Thereby, he corroborates the evidence of PW1 - Vinodbhai Ramjibhai Toliya, PSI, Kheda Police Station. He has clearly opined that the burnt injuries which deceased Pragnesh received, could be caused by pouring kerosene by someone from opposite directions and igniting him. This witness, also, deeply cross-examined by the defence, but there is nothing to denote that Dr. Kolte fabricated Exh.47, at least to the extent that he recorded the false case history, because he is further

corroborated by later statements of deceased Pragneshkumar and other witnesses examined in connection with recording of Dying declarations. It would be doing gross injustice to truthful witness if he is not believed. This witness recorded the case history in discharge of his duties as a Doctor in charge at relevant time of the concerned hospital. His deposition is not at all tainted from any corner while the same is appreciated with other witnesses, who recorded the Dying declarations. Nothing could be brought out by the defence to allege that the case history recorded by Dr. Kolte is untrustworthy and hence the reliance cannot be placed on Exh.47 Dying declaration as recorded in shape of case history by this Doctor.

30. Another witness is very important i.e. PW-3, Exh.58 Ashwinbhai Vasudev Dave, Executive Magistrate of Kheda. This witness is, also, an independent witness and he has no grudge or enmity against the accused to associate with the deceased to involve the accused falsely. This witness has stated that on receiving the Yadi from Kheda Town Police Station, he reached to Kheda Civil Hospital at 10.35. He met with the Doctor in-charge. On Yadi at Exh.59, Doctor In-charge recorded that the patient was conscious. This witness recorded Dying declaration, which is produced at Exh.60 in question answer form. He started to record Dying declaration at 11.10 hours. After recording of the Dying declaration, he read over the same to deceased Pragneshkumar and obtained thumb impression of right hand thumb. He has stated that during the period he recorded the statement of the deceased, the patient was constantly conscious. In Exh.60, before this witness also deceased Pragnesh narrated the same story. Further, it clearly appears from his evidence that the witness ascertained about the mental condition as well as physical condition of the patient and recorded the Dying declaration in the words of the deceased. This witness also stood to extensive cross-examination by defence, but nothing could be brought out. This witness in an answer to a question, has deposed that he satisfied himself that till the Dying declaration is recorded, Pragneshkumar was fully conscious. The defence objected to the evidence on the ground that the wordings of Exh.60 stated to have been narrated by deceased are exaggerated. It was urged that with 90% burn injuries, no one can speak this much forcefully to the extent that "I repeatedly request that whatever I have said is correct and that all the culprits must be punished". Considering the Dying declaration as a whole it is, abundantly, clear that this came to a

reply from the deceased on question that whether there was any quarrel in the house of the deceased or whether the deceased was involved in any quarrel at some other place. Naturally, a dying person would be irritated by this question because earlier he narrated the story and when subsequently he was confronted with the question that whether he was involved in any quarrel in his house or somewhere else, the deceased must have construed this question to be casting doubt by the Executive Magistrate in his earlier narration and, therefore, he has replied emphatically to be sure and to confirm his statement, he repeated his request to punish the culprits. There is nothing dramatic or exaggerated in this answer of the deceased as contended on behalf of the appellants. This fact goes to strengthen the prosecution case more than to weaken the same. Appreciating Exh.60 Dying declaration as a whole, it certainly leaves an impression that deceased Pragneshkumar did not wave from the story narrated in the Dying declaration, and not only that but question of the above nature when asked by the Executive Magistrate, deceased irritated, considering the same to be a doubt in his story. It is quite natural that once a person makes a statement and thereafter when he is asked that whether there was any other quarrel at the house or other place in which he might have been involved, the reply naturally would be forcible repetition of the earlier story, if he has stated truth earlier. But, if the earlier story is not truthful, then, his replay may not be the repetition of the earlier one and, therefore, when the Executive Magistrate attempted to search truth and tested the deceased with the above said question, he narrated the same story, which undoubtedly establishes the truthfulness of the Dying declaration and the witness i.e. Executive Magistrate, who recorded the same, and we must put all the credence to this witness, who recorded the Ding declaration - Exh.60, to be the truthful piece of evidence, which can be safely relied upon by us. Further, again the story in its main components, which is narrated in Exh.60, is corroborated by Dying declarations at Exh. 47, and Exh.29 and witnesses Vindobhai Ramjibhai Toliya PW-1 and Dr. Kolte - PW2.

31. Other witness which requires to be appreciated in this connection is PW7 - Patel Suryakantbhai Shivaramabhai - Exh.73. He is the Executive Magistrate at Ahmedabad. As per the prosecution case, on 15th February, 1992, at about 1300 hours, Pragnesh was brought to VS hospital at Ahmedabad, and in pursuance of information received by Ellisbridge Police Station from VS Hospital, the Yadi was forwarded to this witness for

recording of Dying declaration. Patel Suryakant Shivarambhai, Executive Magistrate, reached to Vadilal Hospital at 15.10 and after contacting Doctor and obtaining the information whether Pragnesh - the patient was in fit state of mind to give statement, the witness started recording of statement in question answer form. Unfortunately, after recording the name and address stated by the deceased, the deceased could speak one sentence that Pushpaben, daughter of Dahyabhai Ashabhai Khristi, poured kerosene on him. When this witness started recording the statement, Pragnesh was able to speak one sentence, and after that, the condition of the deceased became serious and he was not able to speak further so in this Dying declaration with this sentence thumb impression was obtained on the same which is exhibited at Exh.75. Further, it took 15 minutes to record the Dying declaration as per the say of this witness. But on that count it could not be said that this Dying declaration suffers vice of infirmity. It is quite natural that with 90% burn injuries after about 6 to 7 hours, this Dying declaration was recorded and thereafter Pragneshkumr succumbed to the injuries. A sentence in Dying declaration to the effect that Pushpa poured kerosene on his body, lends great weight and creditworthiness to earlier Dying declaration. It is established that the Dying declaration was attempted to be recorded, of course, in a fit state of mind to speak this much sentence. It is immaterial that he took 15 minutes for that. One can understand the injuries which he has sustained before six to seven hours along with exhaustion of travelling from Kheda to Ahmedabad. The Dying declaration at Exh.75 assumes importance and satisfies us because the same is in consonance with the previous Dying declarations. It is not the case of the prosecution that he did not state anything else than the sentence which he stated, but the prosecution case is, he was able to speak only that sentence. Had it been the case of manipulation, so many things could have been stated in Exh.75, but no attempt is made, which leads us to believe that recording of Exh.75 is perfect and the deposition of this witness is extremely truthful. Thereafter, on deterioration of his condition, he was not able to speak. For these reasons, this Dying declaration is also extremely creditworthy and reliable.

32. Thus, while considering and appreciating four Dying declarations, as stated above, and the evidence of PW1 - Vinodbhai Ramjibhai Toliya - Exh.27, PW2 Dr.Sanjay Vasantrao Kolte - Exh.46, PW3 Ashwinbhai Vasudev Dave, Executive Magistrate, Kheda, Exh. 58 and PW7 - Patel

Suryakantbhai Shivarambhai, Executive Magistrate, Ahmedabad, Exh. 73, it is clear that all these four witnesses are independent. There was no reason at all for above witness either to fabricate or to concoct Dying declarations. Prudence, therefore, in realm of appreciation of evidence, would not permit us to fathom the situation in which all the above four witnesses, each of them, are extremely independent, conjointly and hand in gloves, conspire against the accused, and recorded four Dying declarations, to implicate the accused i.e. the appellants herein falsely. Discarding the evidence on this count or in any other counts, would be doing injustice to an independent witnesses, who have done their duty truthfully. Therefore, by no stretch of reasoning, it could be said that any of the four Dying declarations was concocted, was not true version of the deceased, and that deceased was not in condition to give statement, and that the witnesses recorded the statement, which was not the statements of the deceased, nor it could be said that the Dying declarations are the result of tutoring, prompting or imagination. The incident which occurred was in a day light and amongst the persons to whom the deceased was very well versed. Therefore, the deceased had ample opportunity to identify the persons involved in the incident. Hence, where all the Dying declarations are consistent with reference to the main story, where it is found that deceased was in fit state of mind to give a statement, where it is found that none of the Dying declarations suffers from any of the infirmities, such evidence could fairly be relied upon to base conviction. In this case, Dying declaration needs no corroboration at all. But even then, all the Dying declarations are corroborated by the above 4 independent witnesses, who are found extremely truthful, impeccable and unblemished.

33. In this view of the matter, we are unable to agree with the contentions raised on behalf of the appellants that Dying declarations could not be believed.

34. Still we shall appreciate extensively the contentions raised by the appellants regarding contemporaneous documents placed on the record and the first investigation, by which Mr. Kumpawat came to the conclusion that deceased had committed suicide. It must be remembered that now this contention of the defence is to be appreciated in the light of what is observed and concluded by us above about weighty and trustworthy evidence to connect the accused with crime.

35. As observed earlier, this is an exceptional case of two investigations, first one is accidental death inquiry, by which Mr. Kumpawat, PSI, Matar Police Station, came to the conclusion that deceased has committed suicide and second is by CPI Mr. Fatesinh S. Khant, by which it is revealed that there were four Dying declarations to be considered.

36. It leads us to examine and appreciation of further evidence of the prosecution. Duty of the prosecution and the prosecutor is to place before the court whatever was available during investigation. Prosecution must be disregarding of conviction and acquittal.

37. The point therefore surfaces is whether the trial vitiates automatically by mere fact of two or more investigations, conflicting or contradicting each other. Whether the whole prosecution case becomes doubtful in such circumstances and benefit whether must go to the accused are the fact requires serious consideration. The prosecution has many components. Some of the components may be separate and independent investigations in the same offence. What should be the duty of the court is a quintessence of the exercise to be undertaken while appreciating such evidence on record. Whether the courts are so weak and incapable or helpless by Criminal Justice System to find out the truth from the conflicting investigation and evidence based on that, or whether the court must endeavour to find out the truth from the conflicting investigations placed on record.

38. In the realm of appreciating of evidence the pious duty of the court would be to discover the truth from the falsehood. In fact, this is the very purpose of appreciation of evidence. Therefore, it is the duty of the court to segregate grains from chaff i.e. truth from falsehood. If the truth and falsehood are so inseparable that it is impossible to bring out the truth without the same being injured by the falsehood, reasonable doubt is the entitlement for the accused , in such circumstances. But, if the truth can smoothly be carved out of the falsehood, by which it is covered than the truth must be discovered and the same can be acted upon by the courts with meticulous care and circumspection. But, there cannot be rule of law or rule of prudence that in case of two conflicting investigations, benefit must go to the

accused, and that contention must be negatived.

39. Thus, what is contended by the defence regarding contemporary documents i.e. Yadi written by the Police station and the investigations by Mr.Kumpawat, must be tested through anvil of strict judicial scrutiny and wisdom. The law which is laid down by the Supreme Court in this regard is very clear. In the case of STATE OF U.P. vs. ANIL SINGH, reported in 1989 SCC (Cr.) 48, in para 17, with reference to embroidery in a prosecution case, Supreme Court observed that if there is a ring of truth in the main, the case of the prosecution due to embroidery, the case should not be rejected. The Supreme Court further pleased to observe that it is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. Supreme Court further observed that it is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform. Therefore, truth should be extracted and acted upon to punish a real culprit. Nothing prevent the court to punish a real culprit. Two investigations by itself could not absolve the accused from the liability of a crime.

40. The Apex Court has given guidelines in appreciating the evidence in such circumstances. In the matter of LEELA RAM (DEAD) THROUGH DULI CHAND vs. STATE OF HARYANA, reported in 2000 SCC (Cri) 222, the Apex Court observed in Para-8 as under :

> "Before however, proceeding with the matter on the counts as above, it would be convenient to note another aspect of the matter, namely, the observations pertaining to the investigation by the investigating agency. It is now a well settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on the issue expecting referring to a decision of this court State of Rajasthan v. Kishore, AIR 1996 SC 3035.

In the matter of STATE OF RAJASTHAN vs. KISHORE, reported in AIR 1996 SC 3035, the Apex Court in para 18

observed as under :

"It is equally true that the investigating officer P.W. 8 committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence. Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account. It is seen from the panchnama recovery of the incriminating material from the scene of offence that there was an attempt to screen the offence by destroying the evidence. Others were prevented from entering the room. That by itself indicates an attempt on the part of the accused to destroy the incriminating evidence and to prevent others from saving the life of the deceased. Therefore, the absence of smell of kerosene oil on the hair sent for chemical examination does not render the dying declaration of the deceased suspect nor would be become unbelievable. The High Court, therefore has not considered the evidence in the proper legal perspective but felt it doubtful like Doubting Thomas with vacillating mind to accept the prosecution case for invalid reasons and wrongly gave to the respondent the benefit of doubt."

Therefore, in this view of the matter, the effect of more than one investigation be the same repugnant to each other is to be considered keeping in mind the guidelines given by the Apex Court in appreciating the evidence. It is always safer instead of half breathing, totality of the situation should be considered and the evidence should be considered from the point of view of trustworthiness judged from the point of view of prudent person.

41. First, we shall deal with the Yadi on which much stress has been placed by the defence to sustain a contention that this being contemporary record, all the Dying declarations contain contrary fact of the death, is a doubt on the veracity of Dying declarations is created.

42. In this respect, it is to be remembered that when Pragnesh reached the hospital, Dr. Kolte informed the

police on telephone i.e. Kheda Town Police Station. As alleged this information from Dr. Kolte was recorded in shape of a Telephone Vardhi, produced at Exh.28. It is mentioned in this telephone vardhi that Mr.Bhimsinh, PSO, Kheda Town Police Station received telephone vardhi from Dr.Kolte that Pragneshkumar received burn injuries while lighting a bonfire to protect from the cold and has been admitted to the hospital. His condition is good and he is conscious. From this telephone vardhi, a note was recorded in Station Diary of Kheda Police Station, which is placed at Exh.35 and 36. Contending same fact, same Head Constable sent a Yadi to the Executive Magistrate, Kheda, which is at Exh.32, stating that Pragneshkumar was admitted to hospital, sustaining burn injuries from bonfire and Executive Magistrate was requested to go to the hospital for recording of the Dying declaration. From the telephone vardhi, a note was made in the telephone register of Kheda Town Police Station, which is at Exh.37, mentioning the fact similar to Exh.27. Vide Exh.38 a Yadi is also produced, which is alleged to have been written by Head Constable, Ellisbridge Police Station to the Executive Magistrate, Ahmedabad, in which also it is mentioned that from the hospital one Medical Officer Dr. R.Makwana, instructed Head Constable Saburdin to convey this to Police Station that one Pragnesh admitted to VS Hospital, who received burn injuries at his residence, who took primary treatment at Kheda Hospital. From this evidence of Yadis, it is being vehemently urged that Dying declarations should not be believed because this evidence establishes cause of death different than stated in all the Dying declarations.

43. Point which is arising, whether on the strength of Dying declarations, the evidence of Yadis to be rejected or this evidence of Yadis creates doubt in trustworthiness of Dying Declarations. The incident in question occurred in mid February i.e. 15th February, 1992 at 9.30 in the morning. The town of Matar, where this incident has occurred is approximately 40 to 50 Kms away from Ahmedabad. It would not stand reason at all that in the mid of February in the town of Matar in the morning at 9.30, any person would be required bonfire to protect from the cold. After 14th January, the season becomes warm to hot gradually, and in the mid of February, one would not need even warmth during night hours, and the question of lighting bonfire to protect from the cold at 9.30 in the morning would be incompatible to the event of ordinary course of nature and would not stand to reason. The question therefore requires to be considered is how this fact came to be recorded by the Police Officers. As established by the

Apex Court this illegality or irregularity would not affect the prosecution case, which would otherwise is acceptable. While dying declarations are extremely truthful evidence and considering this evidence, the vardhi and Yadi assume no evidentiary value at all.

44. The source of information of this evidence of Yadis and vardhis is alleged to be the information from Dr. Kolte. The source therefore is available on record to appreciate because Dr. Kolte is examined vide Exh. 46 as PW2 and nothing is brought out to even remotely suggest that Dr. Kolte had given this information to Kheda town Police Station. Even if we consider that this was the information available to Kheda Police Station in the form of a Yadi Exh.27, then also, it loses its importance because in pursuance of that Yadi, the Executive Magistrate PW-3 Ashwinbhai Vasudev Dave Exh. 58 recorded the Dying declaration of the deceased and the truth came out that Pragnesh did not receive burn injuries from bonfire and as soon as this Dying declaration is proved, the Yadi at Exh.27 loses whatever evidentiary value it bears and all other Yadis based on Exh. 27 till the Yadi, which was addressed by Ellisbridge Police Station to the Executive Magistrate, Ahmedabad, in which it was mentioned that Pragnesh is caught burn injuries at his residence loses importance as evidence. In pursuance of this Yadi also, Patel Suryakantbhai Shivarambhai, Executive Magistrate, PW7 recorded a statement of the deceased and fact was discovered that Pushpa had poured kerosene on the deceased. Therefore, in these circumstances, all the Yadis which are being advanced as trump card by the defence requires to be rejected to be unimportant evidence to dislodge the weight of four Dying declarations.

45. At Exh. 61 PW4 Jaykarbhai Mohanbhai Mecwan is examined. He was present in the hospital when Dr. Kolte relayed the information to Kheda Town Police Station. Jaykarbhai has deposed this fact in his evidence and he on a question being asked, categorically denied that Doctor relayed information regarding bonfire to be the cause of burn injuries to the Kheda Police Station. Witness Jaykarbhai is found truthful and, therefore, what is recorded in Exh.27 is such irregularity and illegality and errors apparent, as cannot to be considered as an evidence having any effect on prosecution case. This fact is further negatived by the circumstances of the case that there was smell of kerosene all over the body

of the deceased. This fact is deposed by Dr. Kolte and, therefore, we can safely rule out the possibility that what is transcribed in Exh.27 is a genuine information relayed by Dr. Kolte to Kheda Town Police Station. This appears to be either intentional attempt or concoction to taint the trustworthiness of the prosecution case or error apparent or irregularity on the part of the police to record. While it is proved amply by cogent evidence that this information was never conveyed to the police station and in this view of the matter, there is no force in the contention that since there was contemporary records denoting cause of death to be other wise than the homicidal dying declarations be viewed with suspicion. The same is required to be rejected.

46. Thus, now we shall examine the second phase of the arguments advanced on behalf of the defence/appellants regarding the first investigation carried on by Mr. Kumpawat which was labelled as an accidental death inquiry under Section 174 of the Criminal Procedure Code. It is forcefully argued that within no time of occurring of the incident, Mr. Kumpawat reached at the scene of incident and whatever he found was nothing but the fact that the deceased committed suicide. It is contended that the panchnama drawn by Mr. Kumpawat, which is produced at Exh.35 is genuine piece of evidence and the prosecution witnesses including complainant has admitted that panchas of that panchnama are respectable and would not sign any wrong papers. A bunch of statements recorded by Mr. Kumpawat on 15th and 16th February, 1992 are on the record. A statement of the complainant alleged to have been recorded by Mr. Kumpawat on 16.2.1992 is also placed on record at Exh.69. On strength of these papers and on the strength of evidence of Mr. Kumpawat, who has been examined as Court Witness at Exh.91, an attempt is made to sabotage the prosecution case by impeaching of all dying declarations.

47. In this respect, we would like to clear the position of law that whatever statements recorded by Mr. Kumpawat under Sec. 174 of the Criminal Procedure Code are nothing more than a statement recorded under Section 161 of the Cr.P.C., and the statements recorded by Mr.Kumpawat are to be dealt with only under Section 162 of the Cr.P.C. to contradict or to corroborate the evidence of witnesses. We are fortified by a decision of the Apex Court in the matter of HARIKIRAT SINGH vs. STATE OF PUNJAB, reported in 1997 SCC (Cri) 1068, wherein

the Hon'ble Supreme Court propounded that the statement made by a witness during inquest proceedings cannot be used as substantive evidence in view of the embargo of Section 162 Cr.PC. Therefore, what is stated by the complainant Mohanbhai Kalidas Mecwan vide Exh.69 should be considered only keeping in view Section 162 of the Criminal Procedure Code. When complainant Mohanbhai was examined, the facts of the statements - Exh.69 either were not brought to his notice or if at all brought to his notice, have not been proved through Mr. Kumpawat, who recorded the statement. In fact, this statement at Exh.69 ought not to have been admitted in the evidence as a document, simply because it is a statement recorded by Police under Sec. 161, which can be used only under Sec. 162 of the Criminal Procedure Code. Therefore, papers of inquiry under Section 174, as produced on record by the prosecution, are irrelevant and not the evidence of the trial. Only that the panchnama as drawn by Mr. Kumpawat during 174 accidental death inquiry i.e. under Section 162 inquest proceedings is required to be taken into consideration.

48. Before we examine Exh. 35 panchnama at length, which has been admitted by the defence, we would like to observe the conduct of Mr. Kumpawat, the then Police Sub-Inspector of Matar Police Station.

His conduct apparently struck us as a biased conduct, which is incompatible with the ordinary course of events and the human nature. The hanging question mark is being a responsible officer of a Police Station, on receiving the information that incident of burning has occurred, instead of going to the Hospital at Kheda, he rushed to the place of incident and immediately at about 11.15, he completes drawing of the panchnama of scene of incident with conclusion that the deceased had committed suicide. This inexcusable conduct of a responsible police officer is to be judged and appreciated along with other circumstances and evidence of the trial. The suspicion in his conduct arises through the evidence of PW4 - Exh.61 Jaykarbhai Mohanbhai Mecwan and the court witnesses No.2 - Exh.90 Lataben Jakhibhai. Both the witnesses while appreciating the evidence are found extremely truthful and no blame whatsoever can be imputed on these witnesses. Jaykarbhai and Lataben in their deposition state that they reached at the scene of offence and took the deceased to the Kheda Hospital. Before reaching the Kheda Hospital, deceased was taken by these witnesses to Matar Police Station because deceased insisted that he would offer his statement to the police.

Both these witnesses have stated specifically to the effect that Pragnesh was taken to the Matar Police Station by them and Mr.Kumpavat was present there. Mr. Kumpawat said that deceased be taken to the hospital and that he would be doing necessary for recording of the complaint. Instead of recording of the complaint, it clearly appears that on strength of this fact, Mr. Kumpawat instead of going to Hospital at Kheda, rushed to the alleged place of incident and the reason is obvious that he must be knowing that what was to be revealed in Kheda, and for the reasons best known to this responsible Police Officer an undue attempt appears to have been made by him to close the case of homicidal death and to create the case of suicidal death. Mr.Kumpawat denies in his deposition regarding the fact that witness Lataben and Jaykarbhai brought the deceased to the Matar Police Station only with a view to contradict the case of homicidal death. An argument is advanced that in none of the Dying declarations, deceased mentioned that he was taken to Matar Police Station and, therefore, witnesses Jaykarbhai and Lataben deposing a fact that they took the deceased to Matar Police Station, is not believable. This argument has no foundation at all. In none of the Dying Declarations, deceased was asked whether he had been to the police station or not? In all the Dying declarations, he was asked regarding the cause of his death and he has replied properly. Therefore, the omission in Dying declaration about going to the Matar Police Station could not be fatal to the prosecution case. On the contrary, the positive fact is proved by these two witnesses, which shows suspicion on the conduct of Mr. Kumpawat.

49. Court witness Mr. Kumpavat specifically and categorically in his statement at Exh.91 states that on the next date on 16th February, 1992, he received a copy of the complaint of the deceased as recorded by Toliya at 12.00 p.m. Not only that, a copy of the Dying declaration Exh.60 recorded by Mr. Ashwinbhai Mohanbhai Dave PW3 - Exh.58 and was received by Mr. Kumpawat. Not only that it is impossible for us to believe that a responsible Police Officer would not have made inquiries in Kheda Hospital and would have not obtained the injury certificate. These were the documents available with Mr. Kumpavat and even then, instead of putting these documents to the judicial scrutiny, taking the administration of justice in his own hands, he deposes that the Dying declaration was false and that the panchnama he prepared, at Exh.35, was correct and, therefore, he came to the conclusion that deceased

committed suicide. It is very shocking that an Investigating Officer starts process of appreciation of quality and category of Dying Declaration of deceased unauthorisedly and without any competence and assumption the status and role of a dispensor of Justice. What a pity against duty! What does it evidently indicate! One would be promoted to readily make an inference that if not only biased conduct influenced by extraneous considerations which do not form Road-Map in a voyage for search of Truth. Therefore, we have no hesitation in coming to a conclusion that the conduct of Mr. Kumpawat was, highly, suspicious and biased.

50. In complaint recorded, on 27.4.1992, Mohanbhai Kalidas Mecwan - Exh. 62 has categorically, stated that after the incident, on next day, at Matar Police Station, along with his wife, he visited Mr. Kumpawat for recording of a complaint, regarding incident, but instead of recording of the complaint, Mr. Kumpawat threatened him and told that the death of Pragnesh is an accident. This fact deposed by the complainant stands proved because had Mr. Kumpawat recorded the complaint, he would not have made representations to higher police officers and Home Department of the State and there was no necessity for the complainant to pursue the representations made by him. His representations are not the threats as branded by the defence, but it is the outcry and misery of a father, who lost his son, aged 24 and the police was sitting tight over it, even there was an evidence to put the accused at least for the trial. His grievances are voiced in his deposition in para 3. However, the defence has attempted to twist this to be a threat to the police and has alleged that due to this threat, second investigation started and accused were put to trial in a case wherein they have falsely involved. It is, utterly, unbelievable that the State machinery would be frightened by the representations of the complainant to the extent that responsible officer of the Police Department, would attempt to involve falsely the accused in serious crime and that too, as per the say of the complainant. Therefore, it is amply clear that Mr. Kumpawat acted high handedly, suspiciously and closed the window of the prosecution by drawing a false panchnama at Exh.35.

51. Further, when we scrutinise the evidence on record, in its totality, we found that the scene of incident was not as referred by Mr. Kumpawat in Panchnama at Exh.35. In Dying Declaration Exh.29 as recorded by PW1 Vinodbhai Ramjibhai Toliya, in Dying

declaration - Exh.47 as recorded by PW-2 Dr. Sanjay Vasantrao Kolte, and in Dying declaration - Exh.60, as recorded by PW-3 Ashwinbhai Vasudev Dave, it is very clear that the scene of incident was somewhere near the residence of accused No.1 and this is further corroborated by other witnesses. The evidence of Court witness No.1 Ramilaben at Exh. 89, on scrutiny, is found truthful and she denies that she had ever shown the place of incident to Mr. Kumpawat to be the backyard of their residence. She has been cross-examined by the prosecution as well as the defence, nothing could be brought about. The evidence of witness Jaykarbhai Exh. 61 is also required to be taken into consideration. He says that on the day of incident, when he was in a shop, his friend Chandrakant came and said that Pragnesh is burnt near his house (Chandrakant's house), witness Jaykarbhai Mohanbhai immediately reached to near the house of Chandrakant and he found that Pragnesh was near a tree which was near the house of Chandrakant. By this weighty evidence, it is amply established beyond reasonable doubt that scene of incident was not the backyard of the house of the complainant, but it was near the house of Chandrakant. Even then, Mr. Kumpawat drawn a panchnama and shown the place of incident to be backyard of the house of the complainant.

52. PW1 - Vinodbhai Ramjibhai Toliya categorically states that the statement which he recorded of deceased, which is at Exh.29, was handed over to Dalpatsinh shortly after recording the same and Dalpatsinh was deputed to Kheda Hospital by Matar Police Station. In ordinary course of event, it must be presumed that Exh.29 was received by Mr. Kumpawat on the same day, though, it is argued that Dalpatsinh has not been examined by the prosecution and that PSI Toliya could not produce the receipt of handing over Exh. 29 to Dalpatsinh. But, this argument is baseless. The fact in issue is whether PSI Toliya had entrusted Exh.29 to Dalpatsinh or not and this fact is proved through the evidence of Toliya and the prosecution has proved this fact. There was no reason for Dalpatsinh to keep this statement with him till the next day at about 12.00 p.m. The only reason for Mr.Kumpavat to depose that he received the statement on the next day because he wanted to justify his biased inquiry and investigation of suicidal death which he completed before 12.00 p.m. on 16.2.1992 and the worst is he had an audacity to depose before the Court that dying declarations were false and whatever he had inquired was correct. Even after 24th of March, 1992, when he received a copy of Exh.60 Dying declaration, he

has not made any attempts to inquire into the matter because since April 27, 1992, the investigation was with him. The statement which might have been recorded by him has not been confronted by the defence to the witnesses examined by prosecution as court witnesses and, therefore, we have only Exh.35 panchnama on record, out of the inquiry and investigation carried out by Mr. Kumpawat.

53. When we consider and appreciate all these circumstances in its totality, we observe that Exh. 35 panchnama is nothing but a cruel attempt to throttle down the case of rightful investigation in a heinous and horrendous broad day light crime of burning of a living, loving and longing a youth in his prime age whose life came to be cut short by the cruel hands.

54. At this juncture again it is argued that there are two versions in the prosecution case and two investigations and that too contradictory to each other. It is argued that this is the prosecution case and the accused are not responsible for that, and where there are two different contradictory investigations and views of the prosecution case, this fact itself is sufficient to resolve in favour of the accused and benefit of doubt must go to the accused.

55. Thus, this argument raises a crucial question as aforesaid that whether in such situation, court becomes helpless, handicap, and that whether the court has no other alternative to grant the benefit to the accused when there is weighty evidence to connect the accused with the crime and at the same time, partly, the story of investigation is a suicidal death.

56. We shall examine the law and guidelines laid down by the Apex Court in such circumstances. In the matter of STATE OF U.P. vs. ANIL SINGH, reported in 1989 SCC (Cri) 48 and in the matter of LEELA RAM (DEAD) THROUGH DULICHAND vs. STATE OF HARYANA, reported in 2000 SCC (Cri) 222,(supra), it is clearly laid down that it is the duty of the court to carve out truth from the falsehood and the irregularity or illegality of investigation must not deter the court to come to a right conclusion when the court is convinced by the evidence that the accused have committed the crime. In the case of STATE OF RAJASTHAN v. KISHORE, reported in AIR 1996 SC 3035, (supra) referred above, the Apex Court held that the

illegality and irregularity in investigation would not vitiate the prosecution case.

57. The Hon'ble Supreme Court categorically observed that the court is not bound by the result of any investigation by the Police. Court is guided only by the principle of appreciation of evidence and to find out the truth from the falsehood. In the matter of DALIP SINGH vs. STATE OF PUNJAB, reported in AIR 1997 SC 2985, in para 8 the Apex Court observed as under :

"Coming now to the defence witnesses, we find that Swaran Singh (D.W.1) and K.S. Kailey (D.W.5), Deputy Superintendent of Police and Additional Deputy Superintendent of Police respectively of Ferozepur were examined to testify that they had perused the case dairy prepared by the Investigating Officer and interrogated some of the accused and other persons. On their such exercise they found that three of the accused, namely, Dalip Singh (appellant), Shabeg Singh and Arjan Singh were innocent. In our considered view, the Designated Court ought not to have permitted the defence to adduce the above evidence as it is not legally admissible. In Vijender v. State of Delhi, (1997) 3 JT (SC) 131, a Bench of this Court, of which one of us a member (M.K. Mukherjee, J.) while dealing with a similar question observed as under :

"The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent Court to take cognizance thereupon under Section 190(1)(b), Cr.P.C. and to proceed with the case of trial, where the materials collected during in investigation are to be translated into legal evidence. The trial Court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof."

We may further add that if the result of investigation was to be made the basis of a Court's verdict regarding guilt or innocence of an accused, there would be no need of a trial in a police case for, relying on the report

submitted under Section 173(2), Cr.P.C. a Court would be entitled to decide the fate of the person arraigned. The evidence of D.Ws. 1 and 5 must, therefore, be left out of our consideration. Incidentally, we may mention that in spite of the opinion expressed by the above two superior officers charge-sheet was submitted by the Investigating Officer against the above mentioned three accused."

Thus, the court is entitled to decide the fate of person arraigned in an incident by the investigation in a given case because the decision of a court must be based on legal evidence and not on materials collected by the investigation agency.

58. In the matter of STATE OF KARNATAKA vs. K.YARAPPA REDDY, reported in 2000 SCC (Cri) 61 in para 19 the Apex Court ruled that suspicious role of the Investigating Officer is not fatal to the prosecution cas. In para 19, the Apex Court observed as under :

"But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently on the impact of it. Otherwise, the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it

albeit the investigating officer's suspicious role in the case."

59. Therefore, criminal justice should not be made casualty for the wrong committed by the Investigating Officers in the case. In this case as we have discussed hereinabove, the role of Kumpawat is, highly, dubious and suspiciously biased and the material collected by him during inquiry under Section 174 of the Criminal Procedure Code must be thrown overboard in view of cogent and convincing evidence of the Dying declarations of the deceased. It is shockingly held by us that Kumpawat, PSI, Matar Police Station was on duty, to achieve his goal, to defeat the cause of justice and to destroy and contradict the evidence of serious criminal trial, for the reasons best known to him. Criminal Courts and Criminal Justice as held by the Apex Court, cannot be made a weapon in the hands of such unscrupulous Investigating Officers and that the courts are not so weak and handicapped as cannot segregate grains from chaff. Therefore, the accused cannot gain any capital out of the investigation of Mr. Kumpavat and out of the Yadis i.e. record of Police Station. In this view of the matter, we, regretfully, negative the arguments advanced on behalf of the appellants.

60. It is hoped that learned APP Mr. K.P. Raval attending the Appeals from the State's side shall convey to the State for corrective measures for the future recurrence of such unscrupulous investigation. To our surprise, till date, nothing has been done as a corrective measure by the State. We are, also, unhappy with the approach of the State machinery which takes a long time to redress the cries and miseries of citizen of this free country and welfare State. State machinery took about more than two months to give due attention to the grievance of the complainant. It is apart that any redress, may or may not be legally given to a citizen, who makes representation in the serious matter, undoubtedly, we consider that, it is moral and Constitutional duty of the State machinery to look into it immediately. Suffice it say that, the State may do the needful to prevent such recurrences.

61. Now, this leads us to examine the evidence of the defence, which has been led by accused No.1 Dahyabhai Ashabhai Khristi and accused No.8 Suleman Daudbhai Khristi i.e. appellants No. 1 and 4 of Criminal Appeal No. 686 of 1998 herein. Before we examine and

appreciating the defence advanced, we would like to mention the manner and the mode in which the defence evidence to be led and appreciated. Both the accused have attempted to establish a plea of alibi and it is an established law that the plea of alibi must be proved by cogent and satisfactory evidence completely excluding the possibility of accused persons at the scene of occurrence at the relevant time because the plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of the persons at another place. The plea can succeed only if it is shown that the accused was away from the relevant time and that he could not be in all probabilities present at the place where the crime is committed. Further, the plea of alibi is to be considered keeping in view the evidence of the prosecution and the reliability and the creditworthiness of the same to connect the accused with the crime. Higher reliability and credibility of the prosecution evidence, higher and sticker would be the proof of alibi to dislodge such evidence of prosecution.

62. In the case of BINAY KUMAR SINGH vs. STATE OF BIHAR and allied matters, reported in AIR 1997 SC 322, the Supreme Court observed that it is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally, the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would be, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore,

that strict proof is required for establishing the plea of alibi.

63. To establish alibi of Suleman Daudbhai Khristi appellant No.3, in pursuance of the order of this court, two witnesses came to be examined by the trial court. One is DW - 1 Balkrishna Bhailabhai Khadia - Exh. 9, and the second is DW-2 Chandhubhai Dhulabhai Prajapati Exh.12. An attempt is made out that on 15th February, 1992, since appellant No.3 Suleman Daudbhai Khristi was serving as Work Assistant, he was present at village Khada from 8.00 to 12.00 in the morning and from 2.00 to 6.00 p.m. in the evening. DW1 is an Assistant Engineering in the Irrigation Department, in which appellant No.3 was working as Work Assistant, while DW-2 is the Deputy Executive Engineer. At Exh.10, a certificate is issued by DW-2, to the effect that on 15th February,1992, appellant No.3 Suleman Daudbhai Khristi was present at Khada Section at 8.00 a.m. Now, the evidence of both these witnesses disclose that DW2 Chandhubhai Dhulabhai Prajapati issued a certificate only from papers submitted by DW1 Balkrishna Bhailabhai Khadia and he had no personal knowledge. Exh.10 contains an endorsement in red ink that, in fact, Suleman Daudbhai Khristi was not present on 15th February, 1992 at Khada Section. DW-1 Balkrishna Bhailabhai Khadia in para 2 of his disposition specifically states that on that date, appellant No.3 Suleman Daudbhai Khristi presented himself and gave a report and from that fact only he has stated that appellant No.3 was present at Khada Section for whole day. The witness DW-1 Balkrishna Bhailabhai Khadia further states that he has no personal knowledge whether in fact for whole day the appellant No.3 was on his duty at Khada Section or not. While endorsement in red ink was confronted to this witness by Public Prosecutor, surprisingly this witness stated that Dy.S.P. Mr. Savani got this endorsement under a threat of killing putting a revolver on his temple. Now considering this evidence of DW-1 and DW-2 and Exh.10, it clearly establishes that this is an futile attempt by the accused No.8 i.e. Appellant No.3 to concoct the evidence of alibi. Firstly, there is no evidence at all that appellant No.3 was on duty for the whole day and secondly that DW-1 has made an endorsement on Exh.10 itself with read ink that appellant No.3 Suleman Daudbhai Khristi was not present for whole day at Khada Section. This evidence cannot establish the alibi of appellant No.3 at the place of his duty. It does not exclude by strict evidence the presence of the appellant No.3 from the scene of offence. By no stretch of reasoning, it can be said without any evidence that Dy.S.P Mr. Savani, under

a threat of killing by revolver, got the endorsement put on Exh. 10 by DW-1 that the appellant was not on duty. Therefore, it appears to be a clear futile attempt to fabricate an evidence of alibi. We have therefore no hesitation to throw the evidence of alibi in respect of appellant No.3 overboard and we cannot place reliance on such an evidence, which is required to be proved through strict proof as established by the Apex Court, as observed hereinbefore. It has come in the evidence that distance between Khada Section and Matar is 25 Kms. Incident has taken place at Matar at 9.30 in the morning. What halfheartedly DW-1 Balkrishna Bhailabhai says is at 8.00 a.m. appellant No.3 submitted a report that he was present. In such circumstances, such a plea of alibi must be rejected.

64. Like wise, for accused No.1, i.e. appellant No.1 Dahyabhai Ashabhai Khristi, a case is attempted to be made out for the alibi that during the period of incident i.e. February, 1992, accused No.1 Dahyabhai Ashabhai was working as Talati - Krushi Panch of Limbasi Division. It is stated that on 15th February,1992, accused No.1 along with Sarpanch visited village Nandoli and made recoveries for the irrigation amount from the agriculturists. It is also stated that statements of the agriculturists were recorded in presence of appellant No.1 have been produced from Exh. 22 - 28. In the statement of agriculturists have deposed that either they have deposited the amount of recovery or requested for the installments. These statements, according to the defence case, were in the presence of Dahyabhai Ashabhai i.e. appellant - accused No.1 and Dy. Mamlatdar and Sarpanch. Therefore, Dy.Mamlatdar Bhagwanbhai Kanjibhai Makwan has been examined as DW-4 at Exh.19, who has issued the certificate, which is produced at Exh.29.

65. Appreciating this evidence, it is noteworthy that defence has not made attempt to clarify that what is the distance between village Nandoli and Matar. It is also not clarified that on 15th February, 1992 at what time the statements have been recorded. Statements could have been recorded after 10.00 a.m. when the incident was over. The defence has also not established whether, it was, the statutory or other wise by administrative instructions, the duty of the Talati to sign the statements of the agriculturists which were otherwise before Dy. Mamlatdar. Very important fact is none of the agriculturists, whose statements are produced from Exhibits 22 - 28 has been examined as a witness or tendered to the prosecution for cross-examination and

hence for this simple reason, their statements could not be believed. Therefore, this evidence of defence of alibi is not in terms of the principal laid down by the Apex Court as stated above that in all probability it should be established that the presence of the accused at the scene of offence was excluded. But evidence of defence is neither here nor there. Let alone, it could be said to be a cogent one. We, therefore, reject this defence evidence tendered for appellant No.1 i.e. accused No.1 to prove his alibi for the above said reasons.

66. It is further stated that both the above appellants i.e. appellant No.1 and appellant No.3 has filed Civil Suits against the Government to prevent the Government to suspend them from the duty in the court of Civil Judge (SD) at Nadiad, being Regular Civil Suit Nos. 338 of 1992 and 339 of 1992. Third DW-3 witness Naynaben Rathilal Bhrambhatt, Assistant of the Court of 5th Jt. Civil Judge (SD) written statement filed by the Government in the above mentioned two suits, are produced on record vide Exh. 17 and 18. It is argued that in para 13, it is admitted in the written statement by the Government that both the appellants were present on their duty on 15.2.1992. The pleadings in the Civil Court are generally not binding on the Criminal Court especially in these circumstances because it appears that the affidavit has been filed by One Raojibhai Shankarbhai, Executive Engineer of Irrigation Department. While appreciating the evidence of DW1 and DW2, it has been amply stated by the witness DW-2 that the personal knowledge about the presence of the accused No.1 was known to DW1 only. The other officers - DW2 issued certificate on the strength of the papers. The affidavits-in-reply are also filed on the strength of the papers only. Information stated by the Executive Engineer in the above said affidavits is through the papers which would not make a difference so far as the plea of alibi is concerned. It is not stated in any of the affidavit that the fact of para 13 of the affidavits were of the personal knowledge of deponent. Therefore, this attempt of the defence to establish the alibi evidence fails and we reject the defence evidence of alibi.

67. So far as charge under Section 120-B of the IPC is concerned, the agreement of human mind to commit a crime is always clandestine and not public. Therefore, direct evidence of conspiracy is seldom available. To establish the charge of conspiracy, the whole evidence in

totality is required to be scrutinised, and the conduct of the accused at the time of committing of crime is an important factor. An argument is advanced that, out of 11 original accused, 5 women are arraigned as accused, one of the accused is the grandmother of accused No.2 Pushpa, an aged lady, and the case of conspiracy is not believable. While considering this argument, suffice it to say that phenomenon of human nature is required to be considered and one cannot predict that in given circumstances, a particular person would act or react in a set manner. Human nature is so deep as to immeasurable. It could not therefore be said that conspiracy might not have been hatched by the accused wherein 5 of them are women and one of them is lady of old age. The relevant aspect is, the manner and mode in which the accused have acted during crime. Four Dying declarations make it clear that all the accused rounded the deceased and then crime was committed. This fact necessarily suggests the meeting of minds to do certain act and, therefore, so far as the conclusion of the Trial Judge regarding Section 120-B is concerned, no interference is called for, and we are convinced that the prosecution has proved the charge under Section 120-B of the Indian Penal Code against the appellants.

68. We regrettably unable to agree with the above arguments advanced on behalf of the appellants and come to the conclusion that the judgment and order, so far as the present appellants of both appeals are concerned requires no interference regarding conviction as well as of the quantum of punishment also. We, therefore, sustain the conviction and the order of punishment of the trial court in respect of the appellants of both the appeals.

69. Trial court acquitted Pushpaben - accused No.2, Revinaben - Accused No.3, Gersombhai Yakubbhai Khristi accused No. 7 and accused No. 9 - Mariyamben, W/o Ashabhai Shivabhai Khristi. It was argued that accused No.2 - Pushpaben is named through out, even then the trial court has come to the conclusion that accused No.2 Pushpaben was entitled to be acquitted. It was argued that, therefore, in the circumstances, benefit must also go to other accused.

70. However, the State has not filed any Appeal against the acquittal of accused Nos. 2, 3, 7 and 9. Therefore, the acquittal of these four accused is not within our purview to judge whether those acquittal were

correct or not because the same is not the subject matter of these two appeals. However, from the evidence of the record and the circumstances of the present case, the present appellants re certainly found guilty of the offence charged against them, and therefore, we uphold the order of conviction and punishment as against the appellants of both the appeals.

71. In the result, both the appeals i.e. Criminal Appeal No. 591 of 1998 and Criminal Appeal NO. 686 of 1998 are dismissed. However, both the appellants in Criminal Appeal No. 591 of 1998 i.e. (1) Ramilaben W/o Hasumkhbhai Ashabhai Khristi and (2) Elisaben, W/o Yusufbhai Isudar Khristi, are on bail by the order of this court. It is further ordered that their bail bonds

be continued till 15th November, 2000 so as to enable them to approach to the higher forum and they need not surrender till 15.11.2000.

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